Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

OPPOSITION TO PETITIONS OF THE RURAL TELEPHONE COALITION

The Rural Telephone Coalition ("RTC") opposes certain petitions for reconsideration and clarification of the Report and Order (FCC 97-157) ("Order") establishing new support mechanisms to ensure universal service. The RTC is comprised of the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA") and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"). Together the three associations represent more than 850 small and rural telephone companies.

DISCUSSION

I. THERE IS NO NEED TO ESTABLISH A DIFFERENT TIMETABLE FOR RURAL CARRIERS

MCI asserts that a timetable and order providing for the use of forward-looking economic costs on beginning on January 1, 2001 is needed to ensure that rural areas are not harmed and that competitive carriers have some degree of certainty about the potential funding required of, and made available to them.[1] The Commission has already indicated that it will begin a

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[1] *Id.*

proceeding covering rural carriers support by October 1998. In doing so it recognized that Section 254 of the Act constrained its ability to immediately or precipitously impose forward-looking cost recovery methods on rural carriers. It therefore said rural carriers will receive support using mechanisms incorporating forward-looking economic costs "only when we [referring to the Commission] have sufficient validation that forward-looking support mechanisms for rural carriers produce results that are sufficient and predictable."[2] There is no way that the Commission can guarantee that it will achieve this goal by the January 1, 2001 date certain that MCI wants to impose. Support mechanisms must be based on a record and a thorough analysis of the universal service goals in the Act. It is highly unlikely that this can be achieved by the imposition of artificial deadlines. The Commission should adhere to its plan to begin a proceeding in 1998 and reject MCI's suggestion. The October 1998 time frame will permit the Commission and interested parties to assess results and reflect on the experience in the just begun further proceedings involving the modeling of forward-looking costs for non-rural LECs.[3]

II. THE COMMISSION SHOULD ADHERE TO THE JOINT BOARD DECISION REJECTING MANDATORY END-USER SURCHARGES AND SLC INCREASES AS A MEANS OF ASSESSING CARRIER CONTRIBUTIONS

AT&T's petition asks that the Commission adopt a mandatory end user surcharge for USF recovery in this proceeding or, allow ILECs flow-back of USF contributions assigned to the Common Line basket to be recovered from end users via the SLC. AT&T suggests that recovery

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[2] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, (FCC 97-157) *Report and Order, (Order)* ¶ 252 (May 8, 1997).

[3] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, (FCC 97-256) *Further Notice of Proposed Rulemaking, ("FNPRM")* (July 18, 1997).

via the SLC be limited to the extent that actual SLC rates in a study area are below the SLC caps.[4] MCI also suggests that Commission rules should permit the SLCs to rise to reflect universal service assessments.[5] Neither a mandatory end user surcharge nor a SLC increase meets the requirements of the Act or complies with the Joint Board recommendation outrightly rejecting a federally prescribed end-user surcharge as a means for carriers to recover or pass on universal service contributions.

The state Joint Board members rightly believed that state commissions should have an important role in deciding if the imposition of an end-user surcharge would render local rates unaffordable.[6] The Commission took this concern into account in deciding to base contributions on end-user revenues. Neither AT&T nor MCI have provided any data or arguments to allay this concern. AT&T incorrectly states that the Commission's sole basis for rejecting a mandatory end user surcharge was that it would "eliminate carriers' pricing flexibility to the detriment of consumers. It believes the surcharge is competitively neutral because it will ensure that each consumer pay his or her fair share of support. [7] AT&T misses the essential point that Section 254's "equitable" contribution requirement contains no mandate to pass on equal shares of its contribution obligation to each consumer but, instead, requires that it and all "providers of telecommunications services "make an equitable and nondiscriminatory contribution to the advancement of universal service. 47 U.S.C. § 254(b)(4). The Act also requires "reasonably

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4 AT&T Petition, n. 12.

5 MCI Petition at 7-8.

6 *Order*, ¶ 853.

7 AT&T Petition at 7.

comparable" rates in rural and urban areas. 47 U.S.C. §254(b)(3). Neither AT&T nor MCI have shown how their proposals would meet this requirement.

AT&T argues that competitive neutrality is not satisfied because Competitive Local Exchange Carriers ("CLECs") that enter the local service market through total service resale ("TRS") will not be able to recover any of their USF obligation through access charges paid by IXCs.[8] In AT&T's view, neutrality is violated because CLECs that operate as TSRs will have to pass their assessments on to end users while ILECs will not. The Commission, however, specifically chose end user revenues assessments to satisfy competitive neutrality concerns and avoid double payment problems for resellers.[9] AT&T ignores this fact and other factors affecting ILECs, who, unlike the total service resellers AT&T compares them to, are more likely to have universal service obligations to entire areas and do not have the unrestricted luxury to cream-skim or enter and exit markets where they have deployed facilities. Furthermore, given the interconnection and pricing provisions of Sections 251 and 252 of the Act, an ILEC's ability to pass on universal service assessments is unlikely to be a determinative factor in the competition for customers targeted by TSRs.

MCI also misses the point in its discussion of competitive neutrality. It complains that a rise in the CCL or PICC to recover universal service is not cost-causative.[10] The Commission's mandate is not to issue rules that detail how and whether providers pass on their assessments to their customers on a cost causative basis but to design mechanisms that comport with the six

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[8] AT&T Petition at 5.

[9] *Order*, ¶ 845.

[10] MCI Petition at 7.

principles it must consider under Section 254(1) through (6) and the additional competitive neutrality principle it adopted.

By concentrating principally on competitive neutrality, AT&T and MCI ignore essential elements in the Commission's decision to reject an end-user surcharge. That decision balanced a wide range of factors: the interests of the States in maintaining control over local rates and ensuring affordability, (a matter the Commission left to the States to determine)[11] carriers' interest in pricing flexibility,[12] the administrative simplicity of the end-user revenues method,[13] and elimination of the double payment problem.[14]

III. THE COMMISSION SHOULD NOT ALTER THE REQUIREMENT THAT "PURE" RESELLERS CANNOT GAIN ELIGIBLE CARRIER STATUS

The Commission does not have the authority to alter the reseller restriction to accommodate the AMSC Subsidiary Corporation's request for an exception permitting an entity that resells AMSC's service to gain eligibility and claim support for service to that customer. AMSC also asks that its traffic that involves calls to and from fixed-site subscribers be qualified as "local usage" eligible for support. [15] AMSC contends that these calls originate and terminate in the same local area. The Commission would have to agree with AMSC before resold services can be eligible at all.

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11 Order, ¶ 110-111.

12 *Id.*, ¶ 853.

13 *Id.*, ¶ 848.

14 *Id.*, ¶ 846.

15 AMSC Petition at 5.

The exception AMSC seeks would violate Section 214(e)(1). AMSC has failed to provide any arguments or showing that the public interest requires the blanket exception it seeks for its resold services. The Act plainly requires that support be limited to eligible carriers providing service using their "own" facilities or a combination of their "own" facilities and resale. The resale restriction is not by its words limited to resale of supported services and its underlying purpose goes beyond preventing double recovery by carriers that purchase services supported by universal service. It has a broader purpose of encouraging investment in facilities in high cost areas. As explained in the RTC's petition for reconsideration, the resale prohibition is intended to curb subsidized cream skimming in rural study areas where a competitor has not shown any real investment or commitment by providing its "own" physical facilities, at least in part. (RTC Petition at 13). The Commission should reject AMSC's request since it would violate the plain meaning and intent of Section 214(e). Additionally, AMSC has not shown how "pure" resale, for example, of the services it would have the Commission define as "local usage" is any different from "pure" resale of loops by other carriers that do not receive support.

IV. CMRS PROVIDERS CONTRIBUTIONS TO UNIVERSAL SERVICE SHOULD NOT BE DISCOUNTED

Paging service providers contend that their contributions to universal service should be discounted because they are technically incapable of providing the "core" services defined as universal service, cannot become eligible carriers or receive minimal benefits from the ubiquitous network that universal service funds enable.[16] Teletouch Licenses, Inc. ("Teletouch") and ProNet, Inc. ("ProNet") also assert that the imposition of mandatory contributions from

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[16] Personal Communications Industry Association (PCIA) at 2, Teletouch at 4, ProNet at 4.

paging carriers and other Commercial Mobile Radio Service ("CMRS") carriers to the Universal Service Fund constitutes an unlawful taking or "tax."[17]

These arguments are incorrect and misleading and should be rejected. The paging carriers have not shown that they will not benefit from the ubiquitous network and the universal access that support is intended to achieve. Paging services would not exist but for the public switched network utilized by their customers to receive and send calls. The fact that these providers cannot meet the requirements of "eligible carriers" is not relevant. They are not alone in that regard and Congress has not limited contributors to "eligible carriers" but instead required that all providers of telecommunications services contribute. 47 U.S.C. § 254(d). The Commission should not begin to carve exceptions or special rules for certain carriers on the basis of their perceived value of the network or their inability to receive support. The "equitable" contribution requirement in the Act contemplates that all carriers will be governed by the same rules. The Commission's rules are fair in that the same measure is used to assess the contributions of all contributors. Special rules for the paging services would single them out for more favorable treatment. Congress has already given consideration as to which carriers should be excepted by permitting the Commission to exempt de minimus contributions.

The paging services are also incorrect in contending that their contributions constitute an unlawful tax. The Commission appropriately rejected similar arguments posited in the comments and reply comments of several parties in response to the Federal-State Joint Board on Universal Service Recommended Decision.[18] It correctly concluded that "a regulation is a tax

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[17] ProNet Petition at 9, Teletouch at 2-3.

[18] *Order* ¶ 598.

only when its primary purpose judged in legal context is raising revenue . . . "[19] It is long-settled law that the imposition of assessments on members of a particular industry, such as mandatory USF contributions, is a legitimate means of regulating commerce[20] and does not involve Congress' "taxing power." The money raised from USF contributions will not commingle with the "general revenue."[21] Rather, it will be collected by an independent, third-party administrator and distributed for the specific and sole purposes of promoting the statutorily defined universal service goals.[22] It constitutes a fund raised from those who are engaged in the provision of telecommunications services, and who make profit out of it, for legitimate purposes directly related to the regulation of the telecommunications industry.[23]

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[19] *Id.*, (*quoting Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1304 (D.C. Cir. 1988)).

[20] *Head Money Cases*, 112 U.S. 580, 595 (1884) ($0.50 fee for each immigrant brought into country, imposed by executive officers on ship owners which contributed to a fund which paid for the temporary care of the immigrants and the protection of neighboring U.S. citizens, ruled not to be an unlawful exercise of taxing power, but rather the "mere incident of the regulation of commerce."); *Cf. Brock v. Washington Metropolitan Area Transit Authority*, 796 F.2d 481 (D.C. Cir. 1986) (*citing South Carolina v. Block*, 717 F.2d 874 at 887 (4th Cir. 1983) ("The mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised . . . The imposition of assessments have long been held to be a legitimate means of regulating commerce.")

[21] *See Union Pacific Railroad Co. v. Public Utility Commission*, 899 F.2d 854 at 859 (9th Cir. 1990) (finding primary purpose of levy not to generate general revenue for the government, therefore making levy more like a fee than a tax).

[22] *Id.* at 857-58 (Revenue generated by the levy deposited directly into fund and not made available to pay the general expenses of the government, again making the levy more like a fee).

[23] *Id.* at 596. In the *Head Money Cases*, the Supreme Court found that the sum demanded of the ship owner was not "a tax or duty within the meaning of the Constitution." It concluded that "[t]he money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government. It

CONCLUSION

The RTC requests that the Commission deny the petitions for reconsideration to the extent that they request (1) the establishment of a different timetable for rural carriers; (2) mandatory end user charges and SLC increases to replace existing rules on the assessment of end-user revenues; (3) the redefinition of "pure" resellers in a manner that permits a carrier to become eligible without using its own facilities; and (4) the creation of exceptions and special rules providing for discounted contributions by paging services.

Respectfully submitted,

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August 18, 1997

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constitutes a fund raised from those who are engaged in the transportation of [immigrants], and who make a profit out of it, for the temporary care of the [immigrants]. . .and for the protection of the citizens among whom they are landed."

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Opposition the Rural Telephone Coalition to Petitions in CC Docket No. 96-45 was served on this 18th day of August 1997, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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